Supreme Court, U. S.
FILED
APR 25 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, et al., on Behalf of Themselves and All Persons Similarly Situated, *Appellants,*

v.

MULTISTATE TAX COMMISSION, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 4, 1976
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1977

Supreme Court of the United States

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Appellants,

v.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Relevant Docket Entries

Complaint ..... August 4, 1972

Amended complaint .....January 10, 1973

Defendants' affidavit and notice of motion to vacate the service of process and dismiss the complaint .....February 16, 1973

Memorandum opinion No. 39831 (Tenney, J.), 367 F. Supp. 107 (S.D. N.Y. 1973), denying defendants' motion to vacate service of process and dismiss the complaint .....September 17, 1973

Affidavit and notice of motion by plaintiffs for an order that the action be maintained as a class action ..... October 5, 1973

Answer .....October 1, 1973

Opinion No. 40335 (Tenney, J.) granting motions of twelve corporations to intervene as plaintiffs and allowing the action to be maintained as a class action .....February 5, 1974

Defendants' notice of motion for a three-judge court and for summary judgment .....June 3, 1975

Memorandum decision and order .... July 8, 1976

Judgment .....July 14, 1976

Plaintiffs' notice of appeal ..... September 7, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Amended Complaint

Plaintiffs, on behalf of themselves and all persons similarly situated, allege for their complaint as follows:

THE PARTIES

1. Plaintiff, United States Steel Corporation, is a Delaware corporation; plaintiff, Standard Brands Incorporated, is a Delaware corporation; plaintiff, General Mills, Inc., is a Delaware corporation; and plaintiff, The Procter & Gamble Distributing Company, is an Ohio corporation. None of the named plaintiffs has its principal place of business in Colorado or in a state of which any individual Commissioner is a citizen.

2. The Multistate Tax Compact (the "Compact") went into effect in its party states on August 4, 1967, when seven states had adopted it. As of the present time, the following states have adopted the Compact: Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The Compact has not been given the consent of Congress as required by Article I, Section 10, clause 3 of the United States Constitution.

3. The Compact provides for the establishment of the Multistate Tax Commission (the "Commission") to administer its provisions. (Article IV) It provides for the conduct of interstate audits of multistate taxpayers upon the request of a party state or the Commission may offer

to conduct an audit based on its determination that such audit would be "of interest" to a number of party states; and it purports to provide subpoena powers and authority to seek court orders to the Commission in connection with such audits. (Article VIII) In addition, the Compact provides rules for the division of income (Article IV) which are elective with the taxpayer. (Article III) It also provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Article V) The Compact also provides for the adoption of uniform regulations by the Commission with respect to income tax, capital stock tax, gross receipts tax, or sales or use tax with respect to "any phase of the administration of such law" and the prescription of uniform tax forms. (Article VII).

4. Defendant Multistate Tax Commission has been organized under the provisions of Article VI, Section 1(a) of the Compact. Said Commission has its headquarters at 1909-26th Street, Boulder, Colorado and is a citizen of such State; it also maintains an office at 2 Penn Plaza, New York, New York. Said Commission is, pursuant to Article VI, Section 1(a) of the Compact, composed of one "member" from each party state who is generally the state's chief administrator of the types of taxes to which the Compact applies; each such member is named a defendant herein. Further, pursuant to Article VI, Section 1(f) of the Compact, the Commission has appointed defendant Eugene F. Corrigan, Executive Director. On information and belief, defendant Corrigan is a citizen of the State of Colorado, and each member of the Commission is a citizen of the state of which he is a tax administrator.

JURISDICTIONAL ALLEGATIONS

5. Under color of the Compact and of the laws of various of the party states, defendant Commission, its individual members, and its Executive Director, defendant Corrigan, have threatened and continue to threaten action against

plaintiffs in violaton of the Constitution of the United States and in conflict with the constitutions and laws of the several states. Defendant Commission and defendant Corrigan have demanded that plaintiffs submit to interstate audits to be conducted by said Commission and to turn over their books and records to persons who may not be properly authorized or qualified under state laws to conduct such audits or to receive such books and records and who may not be subject to the confidentiality requirements imposed upon state auditors and to the punishments and penalties provided for breach of such requirements. The Compact and such demands by defendants pursuant to the provisions thereof are invalid under the Compact Clause, Article I, Section 10, clause 3 of the United States Constitution; encroach upon the power of Congress to regulate commmerce among the several states as provided in the Commerce Clause, Article I, Section 8 of the United States Constitution and impose unreasonable burdens on such commerce; violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution; and violate the Fourth Amendment proscription against unreasonable searches and seizures all as more particularly described below.

6. Unless defendant Commission, its members, and defendant Corrigan are restrained by this Court, the constitutional and statutory rights of plaintiffs, United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, and all others similarly situated, will be immediately and irreparably harmed.

7. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1332 and 1343.

8. This action arises under the Constitution, laws and treaties of the United States and the matter in controversy herein exceeds the sum or value of $10,000.00 exclusive of

interest or costs, insofar as, for example, the costs of submitting to the unconstitutional audit demands of defendants, both on the part of the individual plaintiffs and the class as a whole, would be more than $10,000.00.

9. Jurisdiction lies as well under 28 U.S.C. § 1332 as the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest or costs, as aforesaid, and the controversy is between citizens of different states.

10. Jurisdiction lies as well under 28 U.S.C. § 1343(3) without regard to jurisdictional amount to redress the deprivation by defendants, under color of state law, statute, custom or usage, of rights secured to plaintiffs by the Constitution of the United States.

11. Plaintiffs' action for declaratory and injunctive relief is authorized by (a) 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments; (b) 42 U.S.C. § 1983 which authorizes equitable relief for the deprivation under color of law of rights secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States; and (c) 28 U.S.C. §§ 2281, 2284 providing for injunctive relief against the enforcement, operation or execution of any state statute on the ground of unconstitutionality.

12. This is a proper case for a determination by a three judge court pursuant to 28 U.S.C. §§ 2281, 2284, since plaintiffs seek an injunction against implementation and enforcement of a compact between the states having applicability in several states, and state-wide applicability within each state so adopting it, on the ground that said compact and the implementing statutes are contrary to the Constitution of the United States.

13. Venue lies in the Southern District of New York by virtue of the residence therein of plaintiffs and of defendant Commission and by virtue of the fact that the claim

arises therein, as demands for audits have been directed thereto.

14. Service of process upon defendant Corrigan and defendant Commissioners who are not residents of New York is authorized under Federal Rules of Civil Procedure 4(e) and under New York CPLR §§ 302, 313.

Class Action Allegations

15. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(b)(1)(A); 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure.

16. Plaintiffs are members of a class containing, on information and belief, several thousand members consisting of all multistate taxpayers who have been or may be threatened with interstate audits by the Multistate Tax Commission. The class is so numerous that joinder of all members is impracticable. Plaintiffs, who have themselves been subjected to demands to submit to such audits, can fairly and adequately protect the class and are aware of no conflicts of interest among the members of the class. The questions of law and fact raised by plaintiffs' claim are common to and typical of the class, and include the following: (1) whether the Compact is invalid under Article I, Section 10, clause 3 of the United States Constitution; (2) whether the Compact violates Article I, Section 8 of the United States Constitution; (3) whether the Compact violates the Fourteenth Amendment to the United States Constitution; and (4) whether the Compact violates the Fourth Amendment to the United States Constitution.

17. The prosecution of separate actions would create the risk of inconsistent adjudications establishing incompatible standards of conduct for defendants and adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other

members or might substantially impair or impede their ability to protect their interests.

18. The defendants threaten to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

Statement of Claim

19. The Multistate Tax Compact, in enactment and in operation, is in violation to the Constitution of the United States, the constitution of numerous state, and of controlling state law on numerous grounds, including:

A.

20. The United States Constitution, Article I, Section 10, clause 3 provides:

> "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."

21. The Multistate Tax Compact has not been given the consent of Congress and thus is invalid under Article I, Section 10, clause 3 of the United States Constitution.

B.

22. Interstate taxation and the power over interstate commerce are inextricably intertwined. Under Article I, Section 8 of the United State Constitution, Congress has the exclusive authority "to regulate Commerce wih foreign Nations, and among the several States. . . ."

23. Interstate taxation should not be the subject of conflicting legislation by the several states.

24. Congressional interest in regulating interstate taxation and in providing uniform standards therefore has been demonstrated by the introduction, consideration and enactment of several bills.

25. The Multistate Tax Compact encroaches upon this area of exclusive federal supremacy and provides not uniform, but disparate, standards in the area of interstate taxation.

26. In addition, the Multistate Tax Compact discriminates against taxpayers engaged in interstate commerce.

27. By reason of the foregoing, the provisions and implementation of the Multistate Tax Compact violate Article I, Section 8 of the United States Constitution.

C.

28. The Multistate Tax Compact fails to provide adequate standards regarding the qualification of Commission auditors, adequate assurance to multistate taxpayers regarding the confidentiality of audit information and adequate remedies to multistate taxpayers with respect to breach of confidentiality of audit information. The Compact purports to give the Commission broad subpoena powers and authority to seek court orders in connection with the performance of interstate audits.

29. Such standards, assurances and remedies are provided to intrastate taxpayers, such broad powers and authority are not available in connection with the performance of intrastate audits, and discrimination against plaintiffs and other members of the class in these respects is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

D.

30. The Multistate Tax Compact requires plaintiffs and other members of this class to produce their books and records for audit to Commission auditors unqualified under applicable state laws and to whom confidentiality requirements are inapplicable and unenforceable. In addition,

such auditors are agents of a body whose existence is in violation of the United States Constitution, as aforesaid.

31. Defendants' demands for audit in such circumstances constitute demands for unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

32. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves, and all others similarly situated, that this Court:

1. Assume jurisdiction, and convene a three-judge court under 28 U.S.C. §§ 2281, 2284 to determine the merits of this controversy;

2. Determine pursuant to Rule 23(c)(1) of the FRCP that this action may be maintained as a class action;

3. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the FRCP declaring that the Multistate Tax Compact is invalid under Article I, Sections 8 and 10 of the United States Constitution, and Amendments Fourth and Fourteenth thereto, under the Constitutions of the several states, and under controlling state law, and declaring that defendant Commission has been established in violation of the United States Constitution; and

4. Enter preliminary and permanent injunctions enjoining the Multistate Tax Commission and the individual defendants, their successors, agents and employees, and all other persons in active concert and participation with them from implementing and enforcing the provisions of said Multistate Tax Compact, whether through the office of the member states or otherwise, enjoining such Commission

from taking any further actions whatsoever, and requiring such Commission to be disbanded.

Dated: New York, New York
January 9, 1973

WHITE & CASE
By /s/ THOMAS MCGANNEY
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Notice of Motion to Dismiss of Multistate Tax Commission

PLEASE TAKE NOTICE, that the defendants, by their attorneys, will move this Court at Room 618, United States Court House, Foley Square, New York, New York, on the 16th day of February, 1973, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 12(b), subdivisions (1), (2), (5) and (6) of the Federal Rules of Civil Procedure vacating the service of the Summons and Complaint, and dismissing the Complaint herein on the grounds that:

1. This Court lacks jurisdiction over the persons of the defendants Multistate Tax Commission and the individual defendants named as Commissioners of the Multistate Tax Commission, because they are immune from suit by reason of the Eleventh Amendment to the Constitution of the United States, and no consent to this suit has been given, as more clearly appears from the affidavit of Eugene F. Corrigan, annexed hereto.

2. This Court lacks jurisdiction over the person of the defendant Multistate Tax Commission, because the purported service on said defendants within the State of New York by service on one of its tax auditors was a nullity; and this Court lacks jurisdiction over the persons of all the defendants herein, because the summons and complaint were served on each of them outside the State of New York, and the Rules of this Court and the applicable laws of the State of New York do not authorize service of such process outside New York on the agencies of other States, or their

officers, in connection with causes of action arising under the tax law of such States, as more clearly appears from the aforesaid affidavit.

3. This Court lacks jurisdiction over the subject matter of the complaint, because this suit seeks to enjoin, suspend or restrain the assessment, levy and collection of taxes under the tax laws of other states, and obtain a declaratory judgment with respect thereto, in contravention of Title 28, Section 1341 of the United States Code, as more clearly appears from the aforesaid affidavit.

4. The complaint fails to state a claim against the defendants upon which relief can be granted.

Dated, New York, New York
December 21, 1972

/s/ JEROME R. HELLERSTEIN; and

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Decision of Judge Tenney on the Motion to Dismiss Dated September 17, 1973

The decision of Judge Tenney on the motion to dismiss, 367 F. Supp. 107 (S.D.N.Y. 1973), has been reproduced as Appendix B, pages 22a-47a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Answer

Defendants in answer to the amended complaint herein allege as follows:

1. Defendants admit all the allegations contained in Paragraphs 4, 12 and 20 of the complaint.

2. Defendants deny all the allegations contained in Paragraphs 6, 7, 10, 11, 17, 18, 19, 22, 23, 24, 25, 26, 27, 29, 30, 31 and 32 of the complaint.

3. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 9 of the complaint.

4. Paragraph 2. Defendants admit all the allegations contained in Paragraph 2 of the complaint except that they deny that the consent of Congress to the Compact is required by Article I Section 10, Clause 3 of the United States Constitution.

5. Paragraph 3. Defendants admit all the allegations contained in Paragraph 3 of the complaint, except to the extent that they allege that the interstate audits of multistate taxpayers referred to are authorized with respect to all party States under the Compact, which allegations defendants deny; and defendants allege that such interstate audits are authorized only with respect to party States that specifically provide by statute that Article VIII of the Compact shall be in force in such State. (Article VIII-1).

6. Paragraph 5. Defendants admit the allegations contained in Paragraph 5 of the complaint that defendant Commission and defendant Corrigan have demanded that plaintiffs submit to interstate audits to be conducted by said Commission and to turn over their books and records, and deny all the other allegations in said Paragraph.

7. Paragraph 8. Defendants admit the allegations contained in Paragraph 8 of the complaint, that this action arises under the Constitution of the United States; they deny that this action arises under the laws and treaties of the United States; and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in said Paragraph.

8. Paragraph 13. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the complaint that the residence of the plaintiffs is in the Southern District of New York; defendants deny that the residence of the defendant Commission is in said District and that the claim arises therein, but do not contest the venue of the action in said District in the event it should be determined that this Court has jurisdiction over the persons of the defendants and the subject matter of the complaint.

9. Paragraph 14. Defendants admit the allegations contained in Paragraph 14 of the complaint that the defendant Corrigan and the defendant Commissioners are not residents of New York and deny all the other allegations in said Paragraph.

10. Paragraph 15. Defendants admit the allegations contained in Paragraph 15 of the complaint that plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated and deny all the other allegations in said Paragraph.

11. Paragraph 16. Defendants admit the allegations contained in Paragraph 16 of the complaint that plaintiffs have themselves been subjected to demands to submit to interstate audits by the Multistate Tax Commission, and that certain other multistate taxpayers have been or may be subject to such demands; they deny the allegations that the questions of law and fact raised by the plaintiffs' claims are common to and typical of the class, except to the extent that such allegations relate to the question as to whether the Compact is invalid under Article I, Section 10, Clause 3 of the United States Constitution; and deny all the other allegations in said Paragraph.

12. Paragraph 21. Defendants admit the allegations contained in Paragraph 21 of the complaint that the Multistate Tax Compact has not been given the consent of Congress, and deny all the other allegations in said Paragraph.

13. Paragraph 28. Defendants admit the allegations contained in Paragraph 28 of the complaint that the Compact purports to give the Commission subpoena powers and authority to seek Court orders in connection with the performance of interstate audits, but they deny the characterization of such audits as broad; and they deny all the other allegations in said Paragraph.

First Defense

14. The defendant, Multistate Tax Commission (hereinafter referred to as "the Commission"), was created by legislation adopted by each of the member States, and it is the agency of the States for carrying out the Multistate Tax Compact (hereinafter referred to as "the Compact").

15. The individual defendants, other than the defendant Eugene F. Corrigan, are the members of the Commission from their respective States, and they are the heads of the respective State agencies charged with the administration of the types of taxes to which the Compact applies, all in accordance with Article VI thereof. The individual defendants, as members of the Commission, are unauthorized to take any action on behalf of the Commission, and the Commission is not authorized to act except as a body, with a majority of the members present, all as provided by Article VI of the Compact.

16. None of the defendants in this action and none of the States which are parties to the Compact has consented to the maintenance of this action.

17. By reason of the foregoing, this Court lacks jurisdiction over the persons of the defendant Commission and all the individual defendants who are members of the Commission, because they are immune from suit by reason of the Eleventh Amendment to the Constitution of the United States.

Second Defense

18. This Court lacks jurisdiction over the subject matter of the complaint, because the plaintiffs in this suit seek to enjoin, suspend or restrain the assessment, levy or collection of taxes under the tax laws of States, and obtain a declaratory judgment with respect thereto, in contravention of Title 28, Section 1341 of the United States Code.

Third Defense

19. Multistate audits of the plaintiffs and other multistate taxpayers by the Commission, conducted in accordance with Article VIII of the Compact, are valid and violate no provision of the Constitution of the United States, even if it should be determined that the Compact is unconstitutional for lack of the consent of Congress by reason of Article I, Section 10, Clause 3 of the Constitution. Article VIII-1 of the Compact provides:

> "This Article shall be in force only in those party States that specifically provide therefor by statute."

The multistate audits which the Commission has sought to make of the plaintiffs and other multistate taxpayers have been restricted to audits authorized by party States to the Compact that have specifically adopted Article VIII of the Compact by statute. Such statutes and the multistate audits made and sought to be made by the Commission of the plaintiffs and other multistate taxpayers are fully within the powers of the States and are valid and constitutional, irrespective of the constitutionality of the Compact under Article I, Section 10, Clause 3 of the Constitution, and do not violate the Commerce Clause, Article I, Section 8, of the Constitution of the United States, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment, or the Unreasonable Searches and Seizures Clause of the Fourth Amendment thereto.

WHEREFORE, defendants demand judgment that the complaint be dismissed, with costs.

Dated: New York, New York
October 1, 1973

/s/ Jerome R. Hellerstein
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Memorandum Order of Judge Tenney Dated February 5, 1974

The order of Judge Tenney on the motion of sixteen corporations to intervene as plaintiffs and the motion to maintain the suit as a class action has been reproduced as Appendix F, pages 80a-89a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Notice of Motion for Summary Judgment of Multistate Tax Commission

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SIRS:—

Please take notice that upon the annexed affidavit of Eugene F. Corrigan, sworn to June 3, 1975, the exhibit annexed thereto, the plaintiff's statement under Rule 9(g), and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a Term for Motions, to be held before the Honorable Charles L. Brieant, one of the Judges of this Court, at a time and date and at a place to be fixed by the Court, in the United States Courthouse, Foley Square, New York, New York, for:

1. An order, pursuant to Rule 25, of the General Rules of this Court, directing that a hearing be held before a three-judge court; and

2. For summary judgment, pursuant to Rule 56 F.R.C.P., in favor of the defendants and against the plaintiffs and the intervenors, declaring that:—

(a) the plaintiffs and the plaintiffs-intervenors are not entitled to any of the relief requested in the complaint herein;

(b) the Compact drawn in question here, and the legislation of each member state with respect thereto, are constitutional and valid;

(c) the Compact does not require the consent of Congress pursuant to Article 1, Section 10, Clause 3 of the United States Constitution;

(d) the Compact does not encroach upon the exclusive federal supremacy with respect to interstate commerce as provided in Article 1, Section 8 of the United States Constitution;

(e) the Compact does not unconstitutionally discriminate against multistate businesses engaged in interstate commerce under Article 1, Section 8 of the United States Constitution; and

(f) the Compact does not create disparate standards in the area of interstate commerce in violation of any of the plaintiff's constitutional rights under Article 1, Section 8 of the United States Constitution;

(g) the Compact does not in any ways unconstitutionally discriminate against plaintiffs—multistate taxpayers as contrasted with intrastate taxpayers in violation of due process or equal protection or any other provision of the Fourteenth Amendment of the United States Constitution;

(h) the Compact does not violate the Fourth Amendment to the United States Constitution; and

3. Pursuant to Rule 65 FRCP enjoining the plaintiffs, the members of the class which they purport to represent, their successors, agents, servants and employees, and all other persons acting in concert with them, from impeding or in any ways interfering with the Multistate Tax Commission with respect to its attempts to enforce the provisions of the Compact and in auditing the books and records of plaintiffs and other members of the class; or in the alternative;

4. Granting to the defendants summary judgment, pursuant to Rule 56 FRCP, dismissing the complaint and declaring that the Compact, and all state legislation relating thereto, are valid under the United States Con-

stitution and that the Multistate Tax Commission may constitutionally exercise the powers granted to it by the Compact; and

5. Granting to defendant such other and further relief as to the Court may seem just and proper, on the grounds that there is no genuine issue as to any material fact and the defendants are entitled to judgment as matter of law.

Yours, etc.

Dated: New York, N.Y.
June 3, 1975

WILLIAM D. DEXTER and
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Rule 9(g) Statement of Multistate Tax Commission

The following constitutes the material facts as to which the defendants contend there is no genuine issue to be tried.

THE PARTIES

This action was commenced by plaintiffs, United States Steel Corporation, Standard Brands, Incorporated, General Mills, Incorporated, and the Proctor and Gamble Distributing Company, on behalf of themselves and all persons similarly situated (Amended Complaint, p. 1). The following additional corporations are intervenor plaintiffs: Bristol-Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Harvester Company, International Paper Company, International Tel. & Tel. Corp., International Business Machines*, Xerox*, McGraw-Hill, Inc., N.L. Industries, Inc., and Union Carbide Corporation (Judge Tenney's decision dated February 5, 1974). The plaintiffs are all engaged in business in more than one state and thus subject to the provisions of the Multistate Tax Compact pertaining to interstate business and to taxes imposed by more than one state. (Corrigan Affidavit p. 2)

The defendants in this cause are the Multistate Tax Commission and its Executive Director, Eugene F. Corrigan, who administer the "Multistate Tax Compact" entered into by 21 states by appropriate state legislation. (Amended Complaint, pp. 1-3) Other named defendants are the tax

* It is our understanding that International Business Machines and Xexox will withdraw as intervenor parties.

administrators of the 21 member states which have adopted the Compact.** (Amended Complaint, pp. 1-3) They include the tax administrator for the states of Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming. These tax administrators are named as commissioners of the Multistate Tax Commission from their respective states. (Amended Complaint, pp. 1-3)

The Controversy

The specific controversy in this cause is whether or not the defendants can administer the interstate (joint) audit provisions of the Multistate Tax Compact (the "Compact") in accordance with its terms absent congressional consent of Congress under Article I, Section 10, Clause 3, of the United States Constitution and without denying the plaintiffs and members of the class various constitutional rights as alleged by plaintiffs in their amended complaint (Amended Complaint, pp. 3-4).

More specifically, as contained in their jurisdictional allegations, the plaintiffs allege that under the color of the Compact and of the laws of various of the party states, Defendant Commission, its individual members, and its Executive Director have threatened and continue to threaten action against plaintiffs in violation of their constitutional rights by the demand of the Defendant Commission, its individual members and Defendant Corrigan to have plaintiffs submit to interstate audits to be conducted by the Commission. They further assert that the Compact and the demands by the defendants to turn their books and records over to the Commission auditors for joint audit purposes pursuant to the provisions of the Compact: (i) are

** California will be the 22nd regular member as of January 1, 1976. (Corrigan Affidavit, p. 1).

invalid under the compact clause Article I, Section 10, Clause 3, of the United States Constitution; (ii) encroach upon the power of Congress to regulate commerce among the several states as provided in the commerce clause, Article I, Section 8, of the United States Constitution; (iii) impose unreasonable burdens on such commerce; (iv) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and (v) violate the Fourth Amendment proscription against unreasonable searches and seizures (Amended Complaint, pp. 3-4).

In order to determine the validity of these complaints as set forth more fully in the plaintiffs' Amended Complaint, it is necessary to examine the provisions of the Multistate Tax Compact to see what it does and does not do.

The Multistate Tax Compact

(1) The provisions of the Multistate Tax Compact (the "Compact") as enacted by the 21 member states are substantially in the statutory form enacted by the state of Washington which statute is attached to the affidavit of Eugene Corrigan. (Corrigan Affidavit pp. 1, 7-14)

(2) The Compact went into effect in its party states on August 4, 1967, when seven states had adopted it. (Amended Complaint, p. 2)

(3) As of the present time, the states whose tax administrators have been named as defendants and the state of California effective January 1, 1976, have adopted the Compact (Amended Complaint p. 2; affidavit of Eugene Corrigan, p. 1).

(4) The Compact contains twelve Articles (Corrigan affidavit, pp. 7-14).

(5) Article I sets forth the purposes of the Compact. These are to:

1) Facilitate proper determination of state and local

tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2) Promote uniformity or compatibility in significant components of tax systems.

3) Facilitate taxpayer convenience in compliance and filing of tax returns and in other phases of tax administration.

4) Avoid duplicative taxation. (Corrigan Affidavit, p. 7)

(6) Article II contains definitions. (Corrigan Affidavit, pp. 6-7)

(7) Article III contains two sections.

a) Section 1 provides in part that:

"Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state . . . may elect to apportion and allocate his income in the manner provided by the laws of such state . . . without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party states . . . or in any one or more of the party states . . . without reference to the election made in others." (Amended Complaint, p. 2; affidavit of Eugene Corrigan, p. 8)

b) Section 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax shall allow a taxpayer meeting certain requirements to file a "short form" and to compute income tax liability on the basis of a percentage of sales volume within the state.

The Commission has no power to enforce this provision. Section 2 is dependent upon its operation by the party state legislatures adopting appropriate legislation. (Corrigan Affidavit, p. 8)

(8) Article IV sets forth the optional apportionment and allocation provisions which the interstate taxpayer is given the option to use for both state and political subdivision income tax purposes as permitted by Article III, Section 1. It sets forth the provisions of the Uniform Division of Income Tax Purposes Act promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 449) and approved by the American Bar Association. This is the most widely used act for the division of income by the income tax states. It is utilized by nearly two-thirds of the states. (Corrigan Affidavit, pp. 5, 8-10) This article grants no power to the Commission.

(9) Article V adopts certain substantive provisions relating to sales and use tax laws. It provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Amended Complaint, p. 2)

(10) Article VI pertains to the Multistate Tax Commission. Sections 1, 2, and 4 of this Article involve the creation and internal management of the Commission. These provisions are self-explanatory and are attached (as well as the other provisions of the Compact) to the affidavit of Eugene Corrigan (Corrigan affidavit, pp. 10-11). Section 1 provides for membership on the Commission, voting rights, meetings, personnel, offices, adoption of by-laws, reports, acceptance of gifts and disclosures of the same, etc. (Corrigan affidavit, pp. 10-11) Section 2 provides for the executive committee, advisory and technical committees, and such other committees as the Commission may establish in accordance with the by-laws. (Corrigan affidavit, p. 11) Section 4 deals with the finances of the Commission and provides for a bud-

get of estimated expenditures and the amounts to be appropriated by the member states, a method of apportionment of the budget amounts among the member states, accounting, auditing, etc. (Corrigan affidavit, p. 11)

Section 4 deals with the "powers" of the Commission as follows:

"3. In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact." (Corrigan affidavit, p. 11)

(11) Article VII deals with the subject matter of uniform regulations and forms as follows:

"1. Whenever any two or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of Article IV of this compact.

"2. Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

"3. The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures." (Amended Complaint, pp. 2-3; Corrigan affidavit, pp. 11-12)

(12) Article VIII pertains to interstate audits. (Amended Complaint, p. 2; Corrigan Affidavit, p. 1..) It reads:

ARTICLE VIII. INTERSTATE AUDITS

"1. This article shall be in force only in those party states that specifically provide therefor by statute.

"2. Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make

charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

"3. The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: PROVIDED, That such state has adopted this article.

"4. The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

"5. The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of

satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

"6. Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

"7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this article.

"8. In no event shall the commission make any charge against a taxpayer for an audit.

"9. As used in this article, 'tax,' in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes."

(13) Article IX is concerned with arbitration of income tax apportionment and allocation disputes between a taxpayer and party states to prevent multiple or double taxation of any taxpayer's income as a result of non-uniform application of the apportionment and allocation rules under Article IV or substantially identical apportionment or al-

location rules. This Article is not in effect and can be placed in effect only whenever the Commission finds a need for settling disputes concerning apportionments and allocations and it adopts a regulation putting the Article into effect. When in effect, it is optional with the taxpayer to submit any dispute to arbitration. (Corrigan affidavit, pp. 5; 12-13)

(14) Article X states the Compact is in force when enacted by seven states and for other states when they enact the same. It specifies how a state may withdraw from the Compact and sets forth the effect of any withdrawal on liability prior to withdrawal and on arbitration proceedings started prior to withdrawal. (Corrigan affidavit, p. 13)

(15) Article XI provides:

"Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States." (Corrigan affidavit, p. 13)

(16) Article XII concerns construction and severability and reads:

"This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the Constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. [1967 c 125 § 1.]" (Corrigan affidavit, pp. 13-14)

IMPLEMENTATION OF THE COMPACT

1. The Multistate Tax Commission (the "Commission") is an entity created by Article VI of the Multistate Tax Compact (the "Compact") entered into by twenty-two states by the enactment of the provisions of said compact by the respective state legislatures, effective as to California on January 1, 1976 (the 22nd member of the Compact). (Corrigan affidavit, p. 1)

2. Attached to the affidavit of Eugene Corrigan is a copy of the Compact as enacted by the State of Washington which provisions are typical of the Compact provisions enacted by the other 21 member states. (Corrigan affidavit, pp. 1, 7-14)

3. Under the Compact, the Commission consists of one member from each party state who shall be the head of the state agency charged with the administration of the type of taxes to which the Compact applies. (Corrigan affidavit, p. 2)

4. The members of the Commission named as defendants herein are administrators of the states that impose various taxes on plaintiffs and other multistate corporations including income taxes on or measured by net income, gross receipts taxes, capital stock taxes and sales and use taxes. (Corrigan affidavit, p. 2)

5. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the plaintiffs or any other persons whatsoever. (Corrigan affidavit, p. 2)

6. The Compact and the enabling legislation adopted by each member state thereof apply only to multistate businesses subject to taxes in more than one state. They do not apply to any corporation which does business in and pays taxes to only one state. It is this distinction that constitutes the basis of classification of corporate taxpayers under the Compact. (Corrigan affidavit, pp. 2, 7 [Definition of Taxpayer])

7. The plaintiffs are multistate corporations subject to the taxes imposed by member states in two or more of the member states and are thus subject to the provisions of the Compact pertaining to interstate or multistate corporations. (Corrigan affidavit, p. 2)

8. All the members of the Commission and Compact have enacted Article VIII pertaining to interstate (joint) audits by the Commission. (Corrigan affidavit, p. 2)

9. The conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the

Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact. (Corrigan affidavit, p. 3)

10. The Commission may refuse the request of a member state or political subdivision thereof to perform a joint audit for the reasons provided in section 5 of Article VIII of the Compact. (Corrigan affidavit, p. 3)

11. Although the Commission may require the attendance of persons within the state where it is conducting an audit or a part thereof or within a member state in which such person resides, at a time and place fixed by it within such state for the purpose of giving testimony with respect to matters in conjunction with a joint audit, the Commission may not punish such person for failure to attend whether such failure is willful or not. (Corrigan affidavit, p. 3)

12. The Commission, in order to obtain audit information from the taxpayer, may apply to any court having jurisdiction and power to issue compulsory process in any state for which it is conducting a joint audit or any member state in which the object of the order being sought is being situated for an order to obtain the information and failure of any person to obey the order of the court is punishable as a contempt of the issuing court. (Corrigan affidavit, p. 3)

13. Information obtained by any audit of the Commission shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States; and such audit information shall be available only in accordance with the laws of the states or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such states or political subdivisions. (Corrigan affidavit, p. 4)

14. The laws with respect to the maintenance of records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records or books. (Corrigan affidavit, p. 4)

15. The Commission may not make any charge against any taxpayer by reason of any joint audit. (Corrigan affidavit, p. 4)

16. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms. (Corrigan affidavit, p. 4)

17. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state. (Corrigan affidavit, pp. 4-5)

18. Congress, other than by the enactment of minimal jurisdictional standards under Public Law 86-272 has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any

state or its political subdivision as pertains to the plaintiffs or corporations similarly situated. (Corrigan affidavit, p. 5)

Dated:

Respectfully submitted,

/s/ William D. Dexter
William D. Dexter
General Counsel,
Multistate Tax Commission

Samuel Noland Greenspoon
Eaton, Van Winkle & Greenspoon
600 - 3rd Avenue
New York, NY 10016

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Affidavit of Mr. Corrigan on Behalf of Multistate Tax Commission

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EUGENE F. CORRIGAN, being first duly sworn, on oath deposes and says the following to which he is competent to testify as a witness:

1. That he is executive director of the Multistate Tax Commission with its headquarters at 1790—30th Street, Boulder, Colorado 80301.

2. That the Multistate Tax Commission (the "Commission") is an entity created by Article VI of the Multistate Tax Compact (the "Compact") entered into by twenty-two states by the enactment of the provisions of said compact by the respective state legislatures, effective as to California on January 1, 1976 (the 22nd member of the Compact).

3. That attached hereto is a copy of the Compact as enacted by the State of Washington which provisions are typical of the Compact provisions enacted by the other 21 member states.

4. That under the Compact, the Commission consists of one member from each party state who shall be the head of the state agency charged with the administration of the type of taxes to which the Compact applies.

5. That the members of the Commission named as defendants herein are administrators of the states that impose various taxes on plaintiffs and other multistate corporations including income taxes on or measured by net

income, gross receipts taxes, capital stock taxes and sales and use taxes.

6. That neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the plaintiffs or any other persons whatsoever.

7. That the Compact and the enabling legislation adopted by each member state thereof apply only to multistate businesses subject to taxes in more than one state. They do not apply to any corporation which does business in and pays taxes to only one state. It is this distinction that constitutes the basis of classification of corporate taxpayers under the Compact.

8. That the plaintiff are multistate corporations subject to the taxes imposed by member states in two or more of the member states and are thus subject to the provisions of the Compact pertaining to interstate or multistate corporations.

9. That all the members of the Commission and Compact have enacted Article VIII pertaining to interstate (joint) audits by the Commission.

10. That the conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of the member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact.

11. That the Commission may refuse the request of a member state or political subdivision thereof to perform a joint audit for the reasons provided in section 5 of Article VIII of the Compact.

12. That although the Commission may require the attendance of persons within the state where it is conducting an audit or a part thereof or within a member state in which such person resides, at a time and place fixed by it within such state for the purpose of giving testimony with respect to matters in conjunction with a joint audit, the Commission may not punish such person for failure to attend whether such failure is willful or not.

13. That the Commission, in order to obtain audit information from the taxpayer, may apply to any court having jurisdiction and power to issue compulsory process in any state for which it is conducting a joint audit or any member state in which the object of the order being sought is being situated for an order to obtain the information and failure of any person to obey the order of the court is punishable as a contempt of the issuing court.

14. That information obtained by any audit of the Commission shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States; and such audit information shall be available only in accordance with the laws of the states or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such states or political subdivisions.

15. That the laws with respect to the maintenance of records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records or books.

16. That the Commission may not make any charge against any taxpayer by reason of any joint audit.

17. That any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the

Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms.

18. That individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting: (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state.

19. That Congress, other than by the enactment of minimal jurisdiction standards under Public Law 86-272, has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the plaintiffs or corporations similarly situated.

20. That Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) promulgated by the National Conference of Commissioners on Uniform State Taxes (see Volume 9a, Uniform Laws Annotated, p. 449) and approved by the American Bar Association. This is the most widely used act for the division of income by the income tax states. It is utilized by nearly two-thirds of the states.

21. That Article IX of the Compact is not in effect.

22. That the Compact became effective in accordance with Article X, section 1 when the seventh member state adopted it on August 4, 1967.

/s/ Eugene F. Corrigan

(Subscription Omitted in Printing)

The Multistate Tax Compact as enacted by the State of Washington, with provisions typical of the Compact as enacted by the member states, was attached hereto. Reference to the Multistate Tax Compact is included in this Appendix at 72, and has been reproduced as Appendix E, pages 54a-79a, in the separately bound appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

Rule 9(g) Statement of Appellants

Except as hereinafter noted, plaintiffs concur with defendants' statement of the material facts as to which there are no genuine issues to be tried, contained in Defendants' Statement Under Rule 9(g) ("Statement").

Both International Business Machines Corporation and Xerox Corporation have withdrawn as intervening parties plaintiff (see Statement, page 1, footnote). A stipulation entered into by all parties and consented to by Judge Brieant on October 20, 1975 dropped both of those companies from the class action. Moreover, the State of Illinois withdrew from the Compact effective August 29, 1975. A stipulation dropping the State Tax Commissioner of the State of Illinois, George E. Mahin, as a defendant in the action has been signed by all parties and has been submitted to Judge Brieant for his consent. There are, therefore, presently 20 party states to the Compact (see Statement, page 2, lines 5, 7) and California will be the 21st party state to the Compact as of January 1, 1976 (see Statement, page 2, footnote). Wherever the Statement reads 21 member states, that number should be 20; and wherever the Statement refers to 22 member states, that number should be 21.

Plaintiffs do not agree with defendants' suggestion that the issues before this Court can be determined by a mere reading of the Compact (see Statement, page 4, lines 1-4). Plaintiffs' amended Complaint is based upon the Compact *and* the *operative effect* of its various provisions. Moreover, plaintiffs contend that, as with any agreement,

whether between private parties or political entities, the actual and potential impact upon multistate taxpayers and interstate commerce of this agreement between several states can be fully understood only in the context of its purpose and operations. Were it otherwise, this Court would be placed in the unlikely and difficult position of having to judge a book by its cover. In this light, plaintiffs submit that the following genuine and material issues exist to be tried:

1. Whether the Compact is an "Agreement or Compact" between states within the meaning of Article I, Section 10, clause 3, of the U.S. Constitution.

2. Whether the Compact is one

> "relating to . . . subjects . . . which the United States can have [any] possible objection or have any interest in interferring with" (Opinion of Justice Field in *Virginia* v. *Tennessee,* 148 U.S. 503 at 517 (1893))

or which

> "might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce" (Opinion of Justice Field in *Wharton* v. *Wise,* 153 U.S. 155 at 171 (1894))

and which thus requires the consent of Congress.

3. Whether the withdrawal from the Compact of one party state (Illinois), the repeal of major provisions of the Compact by another party state (Florida), the disenchantment with and probable withdrawal from the Compact of other party states, and the opposition to the Compact of non-party states is such that the Compact holds out no hope of achieving desirable uniformity in state taxation of interstate commerce but, in fact, has added yet another layer of complexity to the detriment of such commerce.

4. Whether the Compact is an attempt to obstruct Federal legislation by attempting to create an illusion of uniformity in state taxation of interstate commerce through the use of Multistate Tax Commission "advisory" tax regulations in the course of conducting interstate audits when, in fact, most of the party states participating in such audits have not adopted such regulations.

5. Whether Multistate Tax Commission auditors, in conducting interstate audits, have followed the Commission's "advisory" regulations without respect to their adoption by the party states participating in such audits, and, for that reason and others inherent in the nature of interstate audits, have failed to take into account numerous differences in the tax laws of such states (including rules with respect to the treatment of business versus non-business income, combined reporting and foreign source income), all with the prior knowledge and implicit consent of such states, with the result that multistate taxpayers have been subjected to arbitrary tax adjustments.

6. Whether the purpose and practical effect of the Commission's use of its "advisory" regulations and other audit policies adopted by it in conducting interstate audits is to circumvent the legislatures of the individual party states and amend the Uniform Division of Income for Tax Purposes Act, as in effect in several of the party states prior to their joining the Compact and as adopted by all of the party states in enacting the Compact, as well as to amend various other non-uniform tax laws of the various party states, with consequent and adverse impact on multistate taxpayers and interstate commerce.

7. Whether the Commission's interstate audit program, as implemented under Article VIII of the Compact, discriminates against and obstructs taxpayers engaged in interstate commerce as described above and in various other respects including:

a. The unfettered authority of the Commission's Executive Director to appoint auditors "irrespective of the civil

service, personnel or other merits system laws of any party state'' (Compact Article VI, Section 1(g)) notwithstanding the fact that regular state auditors are subject to such laws;

b. The lack of familiarity and experience on the part of the Commission's auditors with the diverse tax laws, regulations, interpretations thereof and policies of the various states on behalf of which they conduct interstate audits; the resulting disregard by such auditors of significant differences in such laws, regulations, rulings and policies and need for duplicative follow-up audits; and the consequent inability of taxpayers to resolve differences of opinion at the audit level with the result that multistate taxpayers have been subjected to arbitrary tax adjustments; and

c. The failure of the Compact and its party states to provide for any penalty for improper disclosure by Commission auditors of confidential tax information, this in contrast to such penalties applicable to regular state auditors.

8. Whether the maintenance in the Commission's by-laws, as a condition imposed by the State of California to that state's becoming a party to the Compact on January 1, 1976, of a provision for weighted voting by state population, as well as by one vote per state, affects the distribution of political power among the party states with respect to regulating state taxation of interstate commerce.

Dated: New York, New York
November 10, 1975

WHITE & CASE
/s/ By THOMAS MCGANNEY
A Member of the Firm
Attorney for all Plaintiffs except Plaintiff Eltra Corporation
14 Wall Street
New York, New York

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

Affidavit of Mr. McGanney on Behalf of Appellants

THOMAS MCGANNEY, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of White & Case, attorneys for plaintiffs in this action. (White & Case also represents all intervenors other than Eltra Corporation). I make this affidavit in opposition to defendants' motion pursuant to Federal Rule 56 of the Federal Rules of Civil Procedure for summary judgment or, in the alternative, for an injunction pursuant to Federal Rule 65.

2. The instant action was commenced in August, 1972, by the filing of an amended complaint (the ''Complaint'') seeking injunctive and declaratory relief on behalf of plaintiffs and all other multistate taxpayers similarly situated. In essence, the Complaint charges that the Multistate Tax Compact between 20 states is illegal because it has not been approved by Congress and that defendant Multistate Tax Commission, organized under the provisions of that Compact, was and is acting illegally and unconstitutionally by seeking to conduct interstate audits of plaintiffs' books and records. The claim for relief is based first on the violation of the Compact Clause of the Constitution and in addition on the allegation that the Compact and the actions which the Commission seek to take would deprive plaintiffs of their rights under the Due Process, Equal Protection and Commerce Clauses of the Constitution as well as constituting illegal searches and seizures. Named as defendants besides the Commission and its Executive Director, Eugene Corrigan, are the members of the

Commission who are generally the chief tax administrators of party states.

3. Defendants' motion for summary judgment should be denied in light of their failure to carry their burden of demonstrating that there are no genuine disputes as to any material facts. The issues of whether Congressional consent to the Compact is required, whether the Compact encroaches upon Congressional regulation of interstate commerce, whether the operations of the Compact place an undue burden on interstate commerce, whether the operations of the Compact unfairly discriminate against plaintiffs in violation of their rights under the Equal Protection Clause or deprive plaintiffs of due process of law or subjects them to unreasonable searches and seizures are inherently factual in nature. Indeed, the brief which defendants have submitted in support of the instant motion amounts to no more than a rehash of the arguments contained in the briefs they submitted in support of their unsuccessful motion to dismiss the Complaint. In his October 17, 1973 opinion, Judge Tenney in dismissing the motion to dismiss on the merits as "frivolous", emphasized the manifest factual issues raised by the Complaint in holding that

> "The well-settled rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. [Citation omitted] Both sides have submitted lengthy and erudite briefs discussing the merits of the claims raised in the complaint. The fact that the parties found it necessary to so extensively brief the sufficiency of the claims tells this Court that a decision must await a determination on the merits."

A copy of Judge Tenney's opinion is attached as Appendix A-1 hereto. United States Magistrate Goettel also recognized the extent of the factual dispute when, in his May 14,

1974 opinion on a motion to compel answers to plaintiffs' first set of interrogatories he stated that

> "The sweeping scope of the constitutional challenges to the Compact is such as to make most of the requested information relevant to the pleadings."

A copy of Magistrate Goettel's opinion is attached as Appendix A-2 hereto.

4. Defendant's instant motion is yet another blatant example of their extensive efforts to prevent plaintiffs from developing any sort of a factual record with which a court might intelligently pass upon the complex and important questions raised in plaintiffs' Complaint. Although the Complaint was filed in August, 1972, defendants filed a motion to dismiss necessitating the drafting of extensive briefs. (A copy of the Complaint is attached as Appendix A-3 hereto). On September 19, 1973, as stated above, Judge Tenney denied defendants' motion as "frivolous." It was, thus, not until September, 1973 that defendants' answer was filed.

5. Plaintiffs moved swiftly after Judge Tenney's decision, filing a motion for declaration of a class action on September 25, 1973. Defendants opposed such motion, but in an opinion dated February 5, 1974 Judge Tenney granted plaintiffs' motion permitting them to maintain the action pursuant to Rule 23(b)(1) and/or (b)(2) as class representatives of all multistate taxpayers who have been or may be threatened with interstate audits by the Commission. (A copy of this opinion is attached hereto as Appendix A-4.)

6. On October 19, 1973, plaintiffs in the class action filed their first set of interrogatories composed of 69 separate questions. After requesting numerous extensions of time to answer such interrogatories, on December 20, 1973 defendants filed objections to 50 of the interrogatories, either in whole or in part, leaving only 19 interrogatories unob-

jected to. It was not until March of 1974, five months after the interrogatories were served, that answers to the 19 interrogatories were filed by each of the defendants. Plaintiffs moved on January 17, 1974, for an order overruling defendants' objections to this first set of interrogatories.*

7. In March of 1974, plaintiffs requested from defendants a number of documents referred to in their partial answers to plaintiffs' interrogatories. On October 31, 1974, more than seven months after the original request, the last of these documents was produced by defendants.

8. Finally, again after several requests for extensions of time in which to serve answers to plaintiffs' first set of interrogatories, defendants served their interrogatory answers in September, 1974, nearly one year after the interrogatories were served. Plaintiffs served a second set of interrogatories on March 31, 1975 consisting of 26 narrowly-drawn questions which were designed solely to fill the gaps resulting from defendants' answers to plaintiffs' first set of interrogatories. Defendants predictably objected to all but one of the second set of interrogatories on grounds virtually identical to those which they raised with respect to plaintiffs' first set of interrogatories.

9. Thus until the middle of October 1975, plaintiffs had been successful in obtaining somewhat incomplete answers

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* Defendants' objections, which covered the gamut from relevancy to objections on the grounds of "political confidentiality", were rejected virtually in their entirety on May 14, 1974 by Magistrate Goettel. (A copy of Magistrate Goettel's decision is attached hereto as Appendix A-2.) The sole exception related to contacts between members of the Compact with U.S. Senators and Congressmen regarding Federal legislation. Magistrate Goettel's ruling was upheld by Judge Tenney who, in an order dated June 14, 1974, in fact granted plaintiffs further discovery than that ordered by Magistrate Goettel. In both well-considered decisions it was stressed that a full exposition of the relevant facts is a prerequisite to any decision on the merits of the issues raised by the Complaint.

to one set of interrogatories, had one attorney spend one day each in Boulder, Colorado and Salem, Oregon inspecting limited records of the Multistate Tax Commission and the Oregon Department of Revenue, and had received some documents in response to two requests therefor. A significant number of the documents requested were not provided and substantial deletions were made from a large number of other documents. Recently, on the eve of this motion, defendants Corrigan and the Commission, but not the individual Commissioners, chose to respond, although wholly inadequately, to the limited second set of interrogatories which had been served upon them by plaintiffs. These eleventh hour, incomplete responses, however, were only forthcoming after plaintiffs were forced to seek them by a motion pursuant to Federal Rule 37. Similarly, defendants have at last served a further, but still far from complete, response to plaintiffs' request for documents—but only by producing materials, which, on the alleged ground of political confidentiality, have been redacted beyond the point where they can be of any use to the plaintiffs.

10. In addition, defendants have engaged in a pattern of behavior suggesting an intent to punish the plaintiff class for instituting this suit in the first place. Plaintiffs have become aware of a concerned effort by the Commission to bring about "capitulation" of the individual members of the class of plaintiffs. Attached hereto as Appendices A-5 and A-6 is an exchange of correspondence between the Commission and the Director of Taxation of the State of Hawaii. In the first letter, the Director of Taxation indicates that he does not wish to take certain coercive action dictated by the Commission and notes that "most corporations appear to be in substantial compliance with our income tax law". However, the Commission responded that:

> ". . . the type of action that we have outlined that of proceeding with the matter unless and until some court stops us has resulted, within the last few weeks, in

compliance by several corporations which had previously resisted. One of them is a corporation which has been seeking to join the lawsuit. Its capitulation is particularly significant."

11. Defendants have attempted to force such "capitulation" by serving a series of subpoenas followed by arbitrary tax assessments when several of the plaintiffs in that action refused to comply with such subpoenas. In all such instances, the taxpayers in question offered to submit to audits by regular state auditors or, in the alternative, to extend the statute of limitations pending the outcome of the federal proceeding. Such offers were uniformly refused.

12. As a result, presently pending are the following suits against class members which are virtually mirror images to the instant suit: *Byron L. Dorgan, North Dakota Tax Commissioner,* Petitioner v. *International Harvester Company,* Respondent, Civil No. A1-74-25 (United States District Court for the District of North Dakota) (this suit has been stayed pending the outcome of the instart action); *The Sperry & Hutchinson Company* v. *New Mexico Bureau of Revenue and Fred Ochesky,* Civil No. NY-77-1 (District Court for the State of New Mexico, County of Santa Fe) (the plaintiff was forced to bring this action to enjoin the enforcement of a Commission audit subpoena; an injunction was granted plaintiff pending the outcome of the instant action); *In the Matter of the Tax Appeal of Colgate Palmolive Company,* Case No. 14151 (Tax Appeal Court of the State of Hawaii) (Collection of arbitrary assessment enjoined pending outcome of this instant action); *State Tax Commission,* Plaintiff v. *Union Carbide Corporation,* Defendant, Civ. No. 1-74-73 (this case is in the Idaho State Supreme Court for the County of Ada); *Multistate Tax Commissioner and Eugene F. Corrigan, Executive Director of the Multistate Tax Commissioner,* Petitioners v. *American Can Company,* Respondent, No. C. 75-165T (United States District Court for the Western District of Washington); *Multistate Tax Commission and Eugene F. Corrigan, Executive Director of the Multistate Tax Commission,* Petitioners v. *Sperry Rand Corporation,* Respondent, (recently removed to the United States District Court for the District of Idaho); and *George Kinnear, Director, Department of Revenue, State of Washington, and Multistate Tax Commission,* Plaintiffs v. *The Hertz Corporation,* Defendant, No. 1780-II, (presently pending before the Court of Appeals of the State of Washington, Division II).

13. Judge Tenney, Magistrate Goettel, and recently Judge Brieant so far have thwarted defendants' attempts to obstruct a decision as to the constitutionality of the Compact based on a full record of the relevant facts. We believe that the defendants' instant motion should likewise be denied. In doing so, this Court will permit the parties to establish a complete record for the United States Supreme Court which both sides expect will ultimately decide the issues. While plaintiffs have had only limited success in their pretrial discovery endeavors, our review of such results to date has revealed that the following items numbered (14-22) substantiate plaintiffs' conclusion that factual disputes remain in this case which would preclude granting defendants' motion.

Effect on Interstate Commerce and Requirement of Congressional Consent

14. In an address by Charles H. Mack, Chairman of the Multistate Tax Commission, to the Twentieth Annual Western States Association of Tax Administrators' Conference on October 4-8, 1971, Mr. Mack stated that

> "Its [the Compact's] success is especially surprising when one considers that, unlike some compacts which have over a period of many years been adopted by all of the states, this compact is involved in a controversial subject matter, has an administrative body known as

the Multistate Tax Commission and is activist in nature."

It is such agreements among states of a controversial and activist nature which the framers of the Constitution had in mind in requiring advance Congressional consent with respect to compacts or agreements which might affect matters placed under the control of the Congress.

15. In a letter dated November 9, 1967 from George Kinnear, Chairman of the Multistate Tax Commission, (a defendant in this proceeding) to F. H. W. Hoefke, Chairman of the Oregon State Tax Comission, regarding the Commission's Joint Audits Committee, Mr. Kinnear stated that

> "We are going to have some rough argument over the question of the necessity of a passage of a consent bill *before we can do anything*. This is one area where there might be particular criticism, thus, I believe it is imperative that this committee limit itself in the immediate future to setting up test audits on a multistate basis and to refrain at this time from drafting a total broad plan for multistate audit." [Emphasis added]

By defendant Kinnear's own admission, therefore, the scope of the interstate audit program and the details of its operation, both current and proposed, are relevant to the need for Congressional consent. Moreover, at the Commission's Executive Committee meeting of February 19, 1973, Mr. Frank Beckwith of Colorado stated that "the primary reason for his state's lack of participation [in the interstate audit program] is the belief that a Consent Bill is a prerequisite." Colorado is thus a party state which believes that at least the Commission's activities under Article VIII of the Compact require Congressional consent. The facts concerning the extent of the interstate audit program and the methods and procedures employed in conducting such audits are thus of the utmost relevance.

16. In a letter dated August 18, 1967 from Theodore W. de Looze of the Oregon State Tax Commission to Mitchell Wendell, Counsel, Council of State Governments, regarding the proposed Multistate Tax Commission bylaws, Mr. de Looze stated with respect to interstate audits that

> "Eventually this should be a fertile area for bylaws. Again, although the material is of the nature that, under an ordinary statute, would be covered by regulations, because bylaws may be adopted without further action, their use should be extended as far as possible. To be considered however, is that fact that many of the provisions in Article VIII may require supplementation, the supplementation of which, if violated, would be a violation of law. For example, the Commission might supplement the manner in which it requires the attendance of persons to give testimony, and the like, and in the ordinary state situation this would be done by regulation and the violation of the regulation would be a violation of law. Can the same be said if this is done by a bylaw? Is this a violation of law for which the person could be cited into court?"

Mr. de Looze further indicated that his comments quoted above would apply also to the matter of arbitration under Article IX of the Compact.

On January 25, 1971, the Commission passed the following resolution

> "The regulations which have been issued pursuant to the provisions of Article IX, relating to arbitration proceedings are hereby repealed and the following regulation is hereby adopted;
>
> 1. No arbitration proceeding shall be commenced under this Article, except as provided in Paragraph (2).
>
> 2. This regulation shall not be amended, revised or repealed on less than two-year written notice."

The arbitration of apportionment and allocation disputes under Article IX of the Compact is one of the areas in which the party states have agreed to take joint action.

The extent to which the Commission has adopted or may adopt binding bylaws or regulations other than for the conduct of purely administrative internal affairs of the Commission is relevant to a determination of the extent of the agreement among the party states, the extent of the delegation of authority from the party state to the Commission, the impact of the Compact on multistate taxpayers and interstate commerce and thus to the need for Congressional consent.

17. The State of California has enacted legislation which would make that State a party to the Compact on January 1, 1976 provided that the Commission

> "... has in effect published bylaws for the conduct of its business, copies of which are on file with the Secretary of State of California, and which provide that to be adopted all matters voted upon must receive both a majority of the number of member states and a majority of the total population of all member states according to the current United States Statistical Abstract."

The existence of such a bylaw provision, and the Commission's intentions with respect to the maintenance thereof, are relevant to the distribution of political power among the party states and thus to whether Congressional consent is required.

18. By a resolution adopted September 10, 1971, the Commission recommended to its party states that Article IV of the Compact "be amended to provide that all corporate income subject to tax by the respective taxing jurisdictions shall be apportioned, and that the distinction between 'business' and 'non-business' income shall be abolished." It was further resolved on such date that "any member state not

conforming to the Multistate Tax Compact, as amended, shall automatically become an associate member of the Compact...." In his March 14, 1972 commentary with respect to a proposed bill which would, among other things, give Congressional consent to the Compact, Executive Director Corrigan indicated that

> "They (the party states) have recently indicated that they do feel that need [to revise the current Compact], particularly with respect to dropping the allocation feature of the current compact in favor of a full apportionment feature."

Article IV of the Compact is identical to a provision in the Uniform Division of Income for Tax Purposes Act ("UDITPA") which has uniformly been interpreted to require formula apportionment of business income and specific allocation of non-business income. Article IV of the Compact has never been amended, but the Commission has adopted regulations requiring full apportionment under Article IV. Such regulations are clearly inconsistent with Article IV, the interpretation of that provision in UDITPA and the acknowledged need on the part of many party states to amend Article IV if full apportionment is to be followed. Notwithstanding the above, Commission auditors have applied full apportionment standards in conducting interstate audits.

Such inconsistencies support plaintiffs' contentions that the Compact is an attempt to obstruct Federal legislation by attempting to create an illusion of uniformity in state taxation of interstate commerce through the use of Multistate Tax Commission "advisory" tax regulations in the course of conducting interstate audits when, in fact, most of the party states participating in such audits have not adopted such regulations. Moreover, the manifest result of such an attempt by the Commission is that Multistate Tax Commission auditors, in conducting interstate audits, have

followed the Commission's "advisory" regulations without respect to their adoption by the party states participating in such audits, and, for that reason and others inherent in the nature of interstate audits, have failed to take into account numerous differences in the tax laws of such states (including rules with respect to the treatment of business versus non-business income, combined reporting and foreign source income), all with the prior knowledge and implicit consent of such states, with the result that multistate taxpayers have been subjected to arbitrary tax adjustments.

As regards the approach taken by the Commission with respect to the business vs. non-business income distinction, in a talk given at the June 24-26 meeting of the Multistate Tax Commission, James H. Peters, State and Local Taxation Editor of the Journal of Taxation, stated that

> "I believe that the full apportionment concept in the regulations is an effort to change the Compact law to what Commission members consider to be a preferable approach to allocation and aportionment, rather than a sound interpretation of the Uniform Act. As such, it represents a legislative effort rather than an administrative effort. In my opinion, what we have seen here is a politicalization of the administrative function. I have the impression that representatives of member States tend to view the Commission much as a legislative body (at first somewhat like a Senate but recently, and with the help of California, more like a House of Representatives) and the Compact much like a constitution; that is, a document setting forth broad general principles under which the Commission has almost unlimited freedom to act. Not only is this an incorrect view of the Compact, I for one, believe that there is great danger in it. Administrators are part of the executive branch of State government, and with one notable exception, are not answerable to an electorate. They do not have responsibility for State fiscal policies and should not be engaged in legislative efforts. [Footnote omitted] *In addition, treating the Compact as a broad delegation of legislative power raises a serious issue with respect to intergovernmental relationships and has a very definite bearing on the need for Congressional consent.*" [Emphasis added]

The facts relevant to the necessity of amending Article IV and to the audit activities of the Commission with respect to full apportionment are relevant to the issues of undue burden upon interstate commerce and the need for Congressional consent.

19. In a letter dated February 24, 1971 from Executive Director Corrigan to Donald Theriot of the Louisiana Department of Revenue, Mr. Corrigan referred to the possibility of Louisiana adopting the Compact in a form different from that adopted by the other party states. Mr. Corrigan stated that

> "Several of our member states have expressed concern that any variation which you might enact into the substantive portions of the Compact would tend to vitiate the Compact as an agreement between your state and the other member states."

The substantive portion in question was Paragraph 6 of Article IV of the Compact relating to the specific allocation of capital gains and losses constituting non-business income. Mr. Corrigan concludes that such change could not be made "without jeopardizing the proposed legislation as Compact legislation. . . ." "As one state has commented," stated Mr. Corrigan, "If Louisiana made the substantive changes proposed with respect to paragraph 6, they would have a compact all right, but they would be the only member state of that particular compact." Such facts as the foregoing are relevant to a determination of the extent of the agreement among the party states.

20. In a letter dated February 18, 1972 from Executive Director Corrigan to Charles H. Mack, Director, Oregon Department of Revenue, Mr. Corrigan discussed the prospects for various non-party states adopting the Compact and also the tenuous membership status of certain party states. A copy of that letter is attached hereto as Appendix A-7. The letter presages the recent dramatic decision of the State of Illinois to withdraw from the Compact effective August 29, 1975.

In addition, I am informed and do believe that several other party states are considering or have considered withdrawing from the Compact. For instance, in his answer to one of the interrogatories in the federal proceeding, John J. Sheehan, Commissioner from the State of Nevada, states that he "discussed the possibility of Nevada's withdrawal from the Compact with a Nevada State Assemblyman between December 1962 and February 1973."

The facts relating to membership in the Compact and to states such as Illinois decision to withdraw from the Compact are relevant to a determination of the extent to which the Compact promotes diversity rather than uniformity in state taxation of interstate commerce and thus to the need for Congressional consent and the constitutionality of the Compact under the Commerce Clause of the Constitution. Moreover, the withdrawal from the Compact of one party state (Illinois), the repeal of major provisions of the Compact by another party state (Florida), the disenchantment with and probable withdrawal from the Compact of other party states, and the opposition to the Compact of non-party states all suggest that the Compact not only holds out no hope of achieving desirable uniformity in state taxation of interstate commerce but, in fact, has added yet another layer of complexity to the detriment of such commerce.

DISCRIMINATION AGAINST MULTISTATE TAXPAYERS AND INTERSTATE COMMERCE

21. In a letter dated September 4, 1970 from Harry W. Jury, Director of Field Operations, Revenue Division, Michigan Department of Treasury, to Executive Director Corrigan, Mr. Jury stated that:

> "In regard to the sales and use taxes, we have discussed this with the supervisor of our auditors, auditing multistate taxpayers. It is our determination this would be an almost impossible task. For example: [name of taxpayer omitted] requires approximately 12 examiners one and one-half years to audit their Michigan sales and use taxes. In the event the same auditors audited for all the other states for sales and use tax, it would be an endless task. If we get into multistate retailers, such as, Sears and Roebuck, Firestone Tire and many others, it is necessary to audit a representative number of the retail stores and only with the taxpayer's permission if the test period used is representative may we project such findings for the entire audit period. *Once again we feel this would be en endless task as the sales and use taxes in all the various states are not uniform in application.* [Emphasis added]
>
> "It would be possible to audit for sellers use tax if the proper documentation were maintained at the commercial domicile. Should the proposed audit program include all the taxes mentioned in the compact (income tax, capital stock tax, gross receipts tax, and sales and use taxes) *it would require complete uniformity for all states. Since no uniform laws and rules are prescribed in respect to these taxes, can any single audit group be expected to deal expertly with the myriad laws involved together with their individual rules and regulations by states.* [Emphasis added].
>
> "It appears to us everything that has been done in relation to the multistate compact to date has to do

with allocation and apportionment. There has been a striving for uniformity between states in this regard, *but apparently nothing, or very little, has been done relative to any difference in the tax base between the states.*" [Emphasis added]

Not only the extent of uniformity in tax laws, but also the extent to which the Commission has trained or proposes to train its auditors to cope with differences in state tax laws, is relevant to a determination of the extent of discrimination against interstate taxpayers and the burdens placed by the interstate audit program on interstate commerce and to the need for Congressional consent. In a letter dated September 10, 1970 from Mr. Corrigan responding to Mr. Jury's letter of September 4, 1970, Mr. Corrigan stated that

"Like you, I believe that joint audits have much greater and earlier possibilities in the case of corporation income taxes than in the case of sales and use taxes. I too have difficulty conceiving of a joint audit of a large retail corporation on behalf of a multitude of states. It would appear that a necessary prerequisite would be a requirement that the corporation account for all of its sales with respect to all of the states, by state, as a matter of course. But even that would not appear to be sufficient unless there were substantially more uniformity in the sales and use tax laws in the various states than is presently the case."

It should be noted that many of the plaintiffs in this action are all "large retail corporations" of the type referred to by Mr. Corrigan. Further with respect to this matter, in a memorandum dated September 30, 1970 from John H. Heckers, Executive Director of the Colorado Department of Revenue, to Multistate Tax Commission Regular Member States, Mr. Heckers recalled "what the drafters of the Compact had in mind when they incorporated the idea of co-

operative interstate auditing into the document." Mr. Heckers stated that

"Since it would be technically impossible for even a highly trained corp of auditors hired by the Multistate Tax Commission (even if they could be found) to be intimately informed on the tax laws and interpretations of 50 states, it was felt [by the drafters of the Compact] that we could reasonably expect more success if the expertise of state auditors on their own tax laws would be utilized; for example, a state conducting one of their regular periodic audits on a corporation located in the state would simply pick up for sales tax figures the amount of sales attributed to other states and for income tax figures the amount of income likewise attributed to other states. This listing of sales and income escaping local taxation would simply be forwarded to the Commission headquarters, duplicated and forwarded to each of the affected states. It would be up to each state to apply its own laws in the assessment of taxes.

"The original drafters were dubious as to the powers of the Multistate Tax Commission to introduce its own auditors into field auditing. The Commission could best serve its purpose by acting as an informational central agency."

In a letter dated November 5, 1970 from H. F. Freeman, Executive Secretary, California State Board of Equalization, to Mr. Corrigan, Mr. Freeman stated that "Although I believe that joint auditing in the sales and use tax areas is not practical, it seems to me that it might be feasible to have reciprocal agreements between states under which audits culd be made to establish the facts relating to jurisdiction." And in a letter dated November 16, 1970, from Mr. Corrigan, responding to Mr. Freeman's letter of November 5, 1970, Mr. Corrigan stated that

"I agree with you concerning the impracticability of performing joint audits in the sales and use tax fields at this time. I think we are obliged to continue to assess possibilities in this field and, to the extent possible, to encourage increased uniformity among state sales and use tax statutes. Increased uniformity is certainly a necessary preliminary to successful joint auditing."

In a letter dated November 2, 1971 from John J. Sheehan, Executive Secretary, Nevada Tax Commission, to Eugene F. Corrigan, Executive Director of the Multistate Tax Commission, Mr. Sheehan stated that

"Nevada has had two unfortunate experiences by having an outside entity conduct an out of state audit for it. While we are gun shy, we nevertheless will welcome the opportunity to participate in the development of control procedures to assure the conduct of meaningful audits on an interstate basis. The problem of training auditors to be familiar with the idiosyncrasies of the multitude of Sales and Use Tax Acts will be difficult."

The problem suggested by all these comments is accentuated by the fact that many if not most of the interstate audits thus far performed by the Commission have been performed not by the Commission's permanent personnel, but by state auditors on temporary loan to and under the supervision of the Commission.

22. In a letter dated December 5, 1972 from Executive Director Corrigan to Norman H. Schmitt of the Ohio Department of Taxation regarding Mr. Schmitt's appointment to the Commission's Joint Audit Committee, Mr. Corrigan stated that

"There is one consideration, however, of which we must remain aware. That is that the confidentiality provisions of the states which are participating in our

joint audits generally preclude the sharing or even discussing, of any audit information with personnel of a state which has not entered into a reciprocity agreement with them. We hope that you and the committee will be able to resolve this problem. Meanwhile, it will apparently be necessary to limit your participation in joint audit activities to those matters pertaining to policy and procedure so that we avoid violating any confidentiality statutes among the states."

The extent to which party states participating in the interstate audit program have entered into such reciprocity agreements is, of course, relevant to a determination of the extent to which multistate taxpayers subjected to interstate audits receive the protection of the various state confidentiality statutes.

23. In addition to the above information thus far elicited in the course of pre-trial discovery, neither the Compact nor any Commission bylaw regulation known to me provides for the application of penalties for the wrongful disclosure of confidential tax information by Commission personnel.

24. Moreover, on information and belief, the Commission audit personnel do not satisfy the civil service, personnel and other merit requirements for auditors of all of the Compact party states participating in the interstate audit program. Such inconsistencies support plaintiffs' contentions that the Commission's interests audit program, as implemented under Article VIII of the Compact, discriminates against and obstructs taxpayers engaged in interstate commerce as described above and in various other respects including:

a. The unfettered authority of the Commission's Executive Director to appoint auditors "irrespective of the civil service, personnel or other merit system laws of any party state" (Compact Article VI, Section 1(g)) notwithstand-

ing the fact that regular state auditors are subject to such laws;

b. The lack of familiarity and experience on the part of the Commission's auditors with the diverse tax laws, regulations, interpretations thereof and policies of the various states on behalf of which they conduct interstate audits; the resulting disregard by such auditors of significant differences in such laws, regulations, rulings and policies and need for duplicative follow-up audits; and the consequent inability of taxpayers to resolve differences of opinion at the audit level with the result that multistate taxpayers have been subjected to arbitrary tax adjustments; and

c. The failure of the Compact and its party states to provide for any penalty for improper disclosure by Commission auditors of confidential tax information, this in contrast to such penalties applicable to regular state auditors.

25. Lastly, the Compact has not received the consent of Congress notwithstanding the introduction in Congress of several bills which, if enacted, would give such consent. Such consent is required, even under Mr. Justice Field's *dictum* in *Virginia* v. *Tennessee,* 148 U.S. 503 (1893) and *Wharton* v. *Wise,* 153 U.S. 155 (1844), for those agreements and compacts which may affect interstate commerce. That the Multistate Tax Compact may so effect interstate commerce is clear from the Report of the Senate Finance Committee with respect to Public Law 86-272 referred to in Appendix B-1

> "This lack of coordination and uniformity in state taxation of interstate commerce has resulted in the creation of sprawling diverse revenue systems with underlying potential for great harm to the economy of the country and to the individual taxpayers to such an extent that urgent remedial action appears necessary.

> "Repeated efforts over the years, in the form of advisory commissions and committees, have failed to satisfactorily resolve the current tax dilemma. Your committee feels that much of the failure experienced in these attempts has been occasioned by the ambitious objectives sought by these groups in the broad area of intergovernmental conflict. The fruits of such efforts have, of course, been enlightening but, unfortunately, have not served to abate existing revenue trends.
>
> "The duplication and, indeed, even the triplication in the field of income taxation, requires that prompt attention be given to the dangers inherent in the widespread exploiting of tax sources among the governmental levels."

And the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, also referred to in our brief, summarized the system for state taxation of interstate commerce as follows:

> "This, then, is an assessment of the State income tax system and its effect on interstate commerce in the United States today. It is the picture of a system which works badly for both business and the States. It is the picture of a system in which the States are reaching farther and farther to impose smaller and smaller liabilities on more and more companies. It is the picture of a system which calls upon tax administrators to enforce the unenforceable and the taxpayer to comply with the uncompliable.
>
> • • •
>
> "Certainly, the problems presented are not easy problems, but they are important problems. *They are important to the States and they are important to the viality* [sic] *of the American common market. Congress has a responsibility to both, and it is time for it to seek a solution.* (Emphasis added.)
>
> • • •

"A prescribed system as widely disregarded as the present one cannot be said to be one which the interests of the States demand be preserved intact at all costs. *At the same time the interests of the nation in a free flow of commerce, unhampered by needless interference, clearly call for a change.*" (Emphasis added.)

It is respectfully requested that the motion for summary judgment, or in the alternative, for injunctive relief, be denied in all respects.

/s/ THOMAS MCGANNEY
Thomas McGanney

(Subscripton Omitted in Printing)

The appendices referred to in this Affidavit are part of the record and have not been reproduced here.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Opinion of the District Court Dated July 8, 1976

The opinion of the three-judge District Court in this case, 417 F. Supp. 795 (S.D.N.Y. 1976), has been reproduced as Appendix A, pages 1a-21a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Judgment of the District Court Dated July 14, 1976

The Judgment of the District Court has been reproduced as Appendix C, pages 48a-50a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Notice of Appeal

The Notice of Appeal, filed September 7, 1976, has been reprduced as Appendix D, pages 51a-53a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Multistate Tax Compact

The Multistate Tax Compact as proposed for enactment has been reproduced as Appendix E, pages 54a-79a, in the separately bound Appendix to the Jurisdictional Statement.